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Cases, Regulations and Statutes

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The potential disadvantage of undivided interests is that IRS may take the position that, on later sale by individuals receiving undivided interests through both the marital and non-marital shares, it may not be possible to maintain the different (usually higher) income tax basis for the interest passing through the marital share with the result that a sale of an undivided interest involves a proportionate part of each basis amount.²⁹ Thus, the basis amounts for the two interests may merge after death.³⁰

FOOTNOTES

- ¹ See generally, 5 Harl, *Agricultural Law* § 44.02 (1996); Harl, *Agricultural Law Manual* § 5.04[3] (1996).
- ² 5 Harl, *supra* n. 1, § 44.02[4]; Harl, *supra* n. 1, § 5.04[3][c][ii].
- ³ 5 Harl, *supra* n. 1, § 44.02[5][a]; Harl, *supra* n. 1, § 5.04[3][c].
- ⁴ 1964-1 (pt. 1) C.B. 682.
- ⁵ 5 Harl, *supra* n. 1, § 44.02[5][b]; Harl, *supra* n. 1, § 5.04[3][d][ii].
- ⁶ Harl, *Farm Estate and Business Planning: Annotated Materials* (June 17, 1996), p. 4-77.
- ⁷ 5 Harl, *supra* n. 1, § 44.08[3]; Harl, *supra* n. 1, § 5.04[6][d].
- ⁸ Estate of Bonner v. United States 84 F.3d 196 (5th Cir. 1996) (ranchland and other property).
- ⁹ See, e.g., Estate of Cervin v. Comm'r, T.C. Memo. 1994-550, *appeal docketed*, 5th Cir., Aug. 31, 1995 (20 percent discount allowed for 50 percent interest in farm and homestead). See also N. Harl, "Discounting Property Values at Death," 4 *Agric. L. Dig.* 189 (1993).
- ¹⁰ Estate of Youle v. Comm'r, T.C. Memo. 1989-138 (discount of 12 1/2 percent allowed for tenancy in common ownership of land).

- ¹¹ Estate of Wildman v. Comm'r, T.C. Memo. 1989-667 (decendent's 20 percent interest in farmland discounted total of 40 percent for minority interest and for restrictions on transferability).
- ¹² See Ltr. Rul. 9336002, May 28, 1993.
- ¹³ 84 F.3d 196 (5th Cir. 1996).
- ¹⁴ *Id.*
- ¹⁵ I.R.C. § 2056(b)(7).
- ¹⁶ 84 F.3d 196 (5th Cir. 1996).
- ¹⁷ See I.R.C. § 2044.
- ¹⁸ 84 F.3d 196 (5th Cir. 1996).
- ¹⁹ *Id.*
- ²⁰ See Ltr. Rul. 9550002, Aug. 31, 1995 (stock included in gross estate under I.R.C. § 2044 aggregated with stock of same class owned outright by decedent and included in gross estate under I.R.C. § 2033); Ltr. Rul. 9608001, Aug. 18, 1995 (partnership interest included in gross estate under I.R.C. § 2044 aggregated with another interest in same partnership under I.R.C. § 2038); Ltr. Rul. 9140002, June 18, 1991 (undivided interests in real estate included under I.R.C. § 2044 aggregated with undivided interest included under I.R.C. § 2033; facts reflect *Estate of Bonner*, 84 F.3d 196 (5th Cir. 1996)).
- ²¹ 658 F.2d 999 (5th Cir. 1981).
- ²² *Id.*
- ²³ *Id.*
- ²⁴ Propstra v. United States, 680 F.2d 1248 (9th Cir. 1982).
- ²⁵ Citizens Bank & Trust Co. v. Comm'r, 839 F.2d 1249 (7th Cir. 1988)(voting and non-voting stock placed in separate trusts).
- ²⁶ Estate of Bonner v. United States, 84 F.3d 196 (5th Cir. 1996).
- ²⁷ *Id.*
- ²⁸ See 5 Harl, *supra* n. 1, § 44.02[4][b].
- ²⁹ See Rev. Rul. 67-309, 1967-2 C.B. 263.
- ³⁰ *Id.*

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

GENERAL-ALM § 13.03.*

PLAN. The debtor's plan provided for satisfaction of a secured claim by transferring a portion of the farm land collateral to the creditor. The creditor objected to the plan as not providing payment of the value of its claim. The court valued the farm land on the basis of the land's development potential because much of the land in the area was held for investment. However, because only a portion of the collateral land was being transferred the court required that the plan provide for an "indubitable equivalent" of the debtor's claim to be paid to the creditor. The court noted that, because the valuation of the land was uncertain and any sale would not be feasible for at least two years, any valuation established by the court could lead to the creditor receiving less than the value of the claim when the land was sold. Although the court did not require any specific remedy for approval of the plan, the discussion suggests that the

creditor receive a lien on any collateral retained by the debtor until the land is sold so that the creditor can seek any deficiency against the remaining collateral. *In re Arnold & Baker Farms*, 85 F.3d 1415 (9th Cir. 1996), *aff'g*, 177 B.R. 648 (Bankr. 9th Cir. 1994).

CHAPTER 12-ALM § 13.03[8].*

ELIGIBILITY. Prior to filing for Chapter 12, the debtors operated a hog farm. The debtors suffered losses in their herd from disease which precipitated the bankruptcy filing. Prior to filing a plan, the debtors turned over all remaining livestock to the secured creditor. The plan provided for full payment on an installment contract for the purchase of the farm land. The land was owned by the debtors and one debtor's mother, who was not a co-debtor in bankruptcy. One effect of the plan payments was to pay the mother's share of the obligation on the farm without any contribution from the mother. During the life of the plan, the debtors' primary income would be from nonfarm employment and the debtors expressed the intent to use

whatever extra income remained to rebuild the livestock herd for the farm; however, this time the animals would be sheep. The debtors did not provide any specific estimates about the number of sheep to be purchased or the costs of or income from raising the sheep. During the plan, the debtors intended to lease some of the farm land for pasture and one debtor planned to provide horse breaking services for a neighbor. However, again, the debtors did not provide specific details as to the amount of income reasonably expected from these activities. The court held that the debtors were not entitled to be Chapter 12 debtors and dismissed the case for bad faith filing in that the plan provided for payment of a nondebtor's obligations, the debtors had little chance to successfully reestablish farming during the plan and the debtors had caused several delays in prosecuting their case. *In re Buckingham*, 197 B.R. 97 (Bankr. D. Mont. 1996).

TRUSTEE FEES. The debtor's Chapter 12 plan provided for a trustee's fee of 10 percent of the payments to be made to the creditors. The trustee objected to the plan, arguing that the fee was to be applied to the payments made to the trustee, resulting in a 11.11 percent charge against the payments to be made to the creditors. The court held that the statutory fee of 10 percent was unambiguous and was limited to 10 percent of the property to be paid to the creditors. The court reasoned that, because the statute assessed the fee against "the payments made under the plan" and because only the trustee makes the plan payments, the fee could not be assessed to payments made to the trustee by the debtor. *In re Wallace*, 197 B.R. 82 (E.D. Mo. 1996), *aff'g*, 167 B.R. 531 (Bankr. E.D. Mo. 1994).

The debtor's Chapter 12 plan provided for payment of the only three creditors, two governmental units and the FmHA (now FSA). The plan provided for direct payments of the secured claims and payments of unsecured claims from disposable income through the trustee. The trustee objected to the direct payments. The court held that, because the creditors were sophisticated creditors, the debtor could make direct payments without payment of the trustee fee. *Matter of Cross*, 197 B.R. 321 (D. Neb. 1996), *aff'g*, 182 B.R. 42 (Bankr. D. Neb. 1995).

CHAPTER 13-ALM § 13.03.*

PLAN. The debtors' Chapter 13 estate included a residence with \$1,700 of nonexempt equity and personal property with \$5,199 of nonexempt equity. The Chapter 13 plan proposed to pay unsecured creditors \$1,795. In determining the amount creditors would receive in a Chapter 7 liquidation, the costs of sale of the residence plus the costs from capital gains from the sale of the residence would leave nothing for payment to creditors from the residence. If the residence was not sold by the hypothetical Chapter 7 trustee, the sale of the personal property would net \$3,400 for unsecured creditors. The Chapter 13 trustee argued that, in determining whether a Chapter 13 plan is fair to creditors under Section 1325(a)(4), the second scenario should be followed because a Chapter 7 trustee would not administer an asset which would not bring any benefit to the estate. The court agreed and held that the debtors' Chapter 13 plan could not be confirmed because it did not provide payments at least equal to the \$3,400 that would be

available from the sale of the personal nonexempt assets. *In re Gayton*, 197 B.R. 331 (Bankr. D. Colo. 1996).

FEDERAL TAXATION-ALM § 13.03[7].*

ALLOCATION OF TAX PAYMENTS. The debtors previously filed Chapter 7 case. The Chapter 7 trustee obtained funds in settlement of a preferential transfer action and applied the funds to payment of the debtors' federal tax claims. The trustee directed that the payments be made for 1982 taxes owed by the debtors, taxes which were dischargeable in the present Chapter 13 case. The debtors filed a motion in the Chapter 13 case to have the trustee's payments in the Chapter 7 case reallocated by the IRS to nondischargeable taxes. The court held that debtors in Chapter 7 are not entitled to allocate tax payments made in the case; therefore, the payment could not be reallocated in the Chapter 13 case. *In re Ferguson*, 197 B.R. 161 (Bankr. S.D. Fla. 1996).

DISMISSAL. In a prior Chapter 13 case, the debtor and IRS entered into a consent agreement which established the amount of the IRS claim and the amount of the secured portion of the claim. That case was dismissed before any distributions were made to the IRS. The debtors filed a second Chapter 13 case and sought to limit the IRS claim to the amount in the consent agreement in the first case. The IRS sought to include additional penalties and interest which accrued during the interim between filings. The court held that the dismissal of the first case vacated the consent agreement. *United States v. Hampton*, 197 B.R. 297 (E.D. Ark. 1996).

CONTRACTS

GUARANTEE. The defendant originally was a partner in a farming partnership with one other partner. The partnership applied for an open line of credit with the plaintiff but the plaintiff required both partners to personally guarantee the obligations of the partnership. The guarantee agreement required any revocation of the guarantee to be made in writing. The defendant signed the agreement but claimed to have not read it nor to have received a copy. The partnership was eventually dissolved and the defendant sold all interest in the concern to a corporation formed by the other former partner. The defendant orally made a request to an officer of the plaintiff to revoke the defendant's guarantee of the corporation's obligations with the plaintiff. At that time, no balance remained on the account. The officer of the plaintiff informed the defendant a week later that the guarantee was released. However, the corporation later defaulted on the line of credit and the plaintiff sought payment from the defendant under the guarantee. The defendant argued that the plaintiff was estopped from enforcing the guarantee. The court held that the doctrine of estoppel was not available to the defendant because the defendant had, or should have had, the same knowledge as the plaintiff that any revocation of the guarantee was to be in writing to be effective. In addition, the defendant did not claim to have given any consideration for the revocation to support an oral modification of the guarantee contract. *Farmland Industries, Inc. v. Bittner*, 920 S.W.2d 581 (Mo. Ct. App. 1996).

FEDERAL AGRICULTURAL PROGRAMS

CROP INSURANCE. The FCIC has issued interim regulations which remove the restriction that precluded eligibility for crop insurance for producers who produce crops on predominately highly erodible land or on converted wetlands. **61 Fed. Reg. 38057 (July 23, 1996).**

FARM LOANS. The FSA has issued proposed regulations which provide that a Notice of the Availability of Loan Service and Debt Settlement Programs for Delinquent Farm Borrowers will be sent after a borrower is dismissed from bankruptcy if the borrower was not previously notified and the account was not accelerated. **61 Fed. Reg. 37405 (July 18, 1996).**

TOBACCO. The CCC has adopted as final the 1996 marketing quota for flue-cured tobacco at 873.6 million pounds and a 1996 price support level of 106.1 cents per pound. **61 Fed. Reg. 37672 (July 19, 1996).**

FEDERAL ESTATE AND GIFT TAX

GROSS ESTATE. The decedent had owned stock with the decedent's predeceased spouse as tenants by the entirety. The stock was received when the corporation, owned in part by the spouse, transferred the stock to the decedent's spouse and the decedent who took ownership with the decedent as tenants by the entirety. In October 1986, the decedent and spouse transferred \$140,000 of stock to their two children for life with remainders to their grandchildren. The decedent and spouse elected to treat the gift as a split gift with each claiming a gift of \$70,000 less two \$10,000 exclusions. The spouse died within three years after the gift and the estate included the taxable gift of \$50,000 in the gross estate. Under I.R.C. § 2001(e), if a joint gift was entirely includible in the spouse's estate under I.R.C. § 2035, then none of the gift was included in the decedent's estate. The court held that the gift was not included in the spouse's estate under I.R.C. § 2035 but was included in the spouse's estate under I.R.C. § 2001(b) as a taxable gift. The estate argued that because the decedent received the stock for no consideration, the full amount of the gifted stock should have been included in the spouse's gross estate under I.R.C. § 2040. The court held that I.R.C. § 2040 did not apply because the gifted stock was not owned by the spouse and decedent at the time of the spouse's death. The court acknowledged that, under I.R.C. § 2035(a), property transferred within three years of death is treated as owned by the decedent; however, the court held that I.R.C. § 2035 did not apply because the stock was included in the spouse's estate by virtue of I.R.C. § 2001(b). **Estate of Greco v. Comm'r, T.C. Memo. 1996-373.**

INTEREST DEDUCTION. The decedent's estate included substantial stock holdings in a family owned corporation. The decedent's will provided for authority for the executor to elect the 15-year installment payment of estate tax. The stock was also subject to sale restrictions which included provisions for repurchase of the decedent's stock in order to make the installment payments. However,

at the death of the decedent, the payment of estate taxes, even with deferral by installment payment, would have required the repurchase of a large number of shares at a time when the corporation could not afford the repurchase. The executor decided to borrow the funds for payment of the full estate tax and incurred interest payments which the executor claimed as a deduction on the estate's initial and amended returns. The IRS argued that the decedent's will required the election of installment payment of estate tax and disallowed the interest deduction. The court held that under the decedent's will and state law, the executor had the discretion to elect how to pay the estate tax, and because, under the circumstances, the executor's election to borrow the funds was advantageous to the estate and the corporation, the interest deductions were allowed. **Estate of McKee v. Comm'r, T.C. Memo. 1996-362.**

RETURNS. After the death of the decedent, the decedent's heir was named executor. The heir had some difficulty administering the estate and, upon the advice of the estate's attorney, filed for a 12 month extension to file the estate tax return. The advice was incorrect because only a six month extension was allowable; however, the IRS approved a six month extension. The notice of the extension was mailed to the heir. The heir had a disagreement with the lawyer and obtained other legal counsel. The heir did not file an estate tax return until seven months after the extended due date for the return. The IRS assessed an addition to tax for the untimely filed return. The heir argued that the late penalty was excused because of the heir's reliance on the advice of the first attorney that a 12 month extension was allowed. The court found that the heir had notice of the six month extension at least several months before the return was actually filed; therefore, the heir did not reasonably rely on the incorrect advice. The heir also argued that the late return was excused because of the complexity of the estate administration. The court held that the heir failed to show any excusable delay because the statutes provide for filing of returns and payment of taxes based on the information available, with amended returns allowed when uncertain aspects of the estate are resolved. **Estate of Mehrafsar v. Comm'r, T.C. Memo. 1996-351.**

FEDERAL INCOME TAXATION

C CORPORATIONS-ALM § 7.02.*

STOCK REDEMPTION. The taxpayers each owned one-half of the stock of a corporation. The taxpayer each had been annually transferring stock to their children who had been actively involved in the management of the corporation for several years. The taxpayers sold some of the remaining shares to the children for cash and had the corporation redeem the remaining shares for a note at fair market value. The note was for less than 15 years, the payment of the note was not dependent upon corporate profits, the taxpayers had no rights under the note or other agreement to receive shares in the corporation in the event of a default of the note, the taxpayer had no interests in the corporation after the redemption and the taxpayers executed an I.R.C. § 302(c)(2)(A)(iii) agreement prohibiting the reacquisition of any interest in the corporation for at least 10

years. The IRS ruled that the redemption was not entered into for the purpose of avoiding payment of taxes, the redemption would be treated as a distribution in full payment of stock, the taxpayers recognized gain based on the difference between their adjusted basis in the stock and the redemption price, the taxpayers could recognize gain on the note on the installment method, no loss was recognizable in the transaction, and the corporation did not recognize any gain or loss on the transaction. **Ltr. Rul. 9632008, May 10, 1996; Ltr. Rul. 9632009, May 10, 1996.**

CASUALTY LOSSES-ALM § 4.05[1].* The taxpayer corporation operated several timberlands which were infected with southern pine beetles. Although the beetles were always present in the timberlands, in several tax years, the beetles caused major damage to the taxpayer's timber. The court held that because an infestation of beetles can kill a tree within days, the infestation at epidemic proportions was a deductible casualty loss. The court held, however, that the taxpayer was not entitled to any deduction because the taxpayer's records were insufficient to prove the amount of loss. The taxpayer also had several forests destroyed by fires and one tract destroyed by the eruption of Mount St. Helens. The court held that the fires and eruption were casualty events allowing the taxpayer a deduction for the loss of trees. The appellate court affirmed on these issues. The taxpayer had used the depletion block method of determining the loss from the casualties. The IRS argued that the "tree stand" method should have been used. The trial court had overruled precedent and ruled that the tree stand method should have been used. The appellate court reversed on this issue, holding that the precedent should have been followed, allowing the depletion block method for determining the amount of loss. The taxpayer began salvage logging of the affected areas and recognized gain from the income from these activities. The IRS had allowed the taxpayer to recognize these gains under I.R.C. § 1033. The trial court held that the taxpayer was not required to offset these gains against the losses. The appellate court affirmed this holding because the salvage operation were considered separate activities from the casualties. **Weyerhaeuser Co. v. U.S., 96-2 U.S. Tax Cas. (CCH) ¶ 50,420 (Fed. Cir. 1996), aff'g in part and rev'g in part, 32 Fed. Cl. 80 (1994).**

CONSERVATION EASEMENT. The taxpayers owned ranch land which included developed and undeveloped land. The taxpayers transferred a conservation easement to a charitable organization for the purpose of maintaining the natural, scenic and open space conditions of the land. The land had been determined to have important wildlife preservation qualities. The easement, in general, prohibited the further development of the area which adversely impacted the scenic views, the agricultural use and the wildlife on the land. The easement gave the organization the authority to prohibit the taxpayers from further development of the land which adversely impacted the goals of the easement, although the taxpayers were allowed to build a second residence on the land and to add additional improvements to the existing homestead ranch. The subsurface mining rights were retained in part by previous owners but the taxpayers presented evidence by mineral experts that no significant amounts of minerals

existed under the surface. The taxpayers retained rights to the surface mining but the easement granted the organization the right to prohibit such mining if it adversely impacted the goals of the easement. The IRS ruled that the transfer of the easement qualified for the charitable deduction. **Ltr. Rul. 9632003, May 7, 1996.**

DEPRECIATION-ALM § 4.03[4].* The taxpayer corporation made improvements to its buildings used in its restaurant business and claimed depreciation under the Asset Depreciation Range for buildings placed in service before January 1, 1981 and ACRS for improvements to buildings placed in service after December 31, 1980. The taxpayer argued that the improvements were included in the ADR Class 57.0 as improvements that were part of the structural shell of the buildings. The Tax Court held that I.R.C. § 1250 property was not included in the ADR Class 57.0 by statute unless the IRS explicitly includes the property in the class. Because the IRS has not included the property in the class, the improvements had to be depreciated using the 15-year recovery period for real property. The appellate court reversed, holding that the property classified under Class 65.0 could be depreciated based on a 10-year useful life. On remand, the Tax Court noted that the parties agreed that assets which could be included under both categories would be classified as Class 57.0 property. The Tax Court held that items such as interior partitions, ceiling systems, electrical lighting, and floor finishes could fit under both categories; therefore, these items were Class 57.0. Other items, such as decor finishes and decorative canopies were only included as Class 65.0 property because these items were more closely related to the operation of a restaurant and not to the building structure. **Walgreen Co. v. Comm'r, T.C. Memo. 1996-374, on rem. from, 68 F.3d 1006 (7th Cir. 1995), rev'g, 103 T.C. 582 (1994).**

HOBBY LOSSES-ALM § 4.05[1].* The taxpayer was a doctor who operated a horse farm. The court held that losses incurred by the horse farm activity were not allowed because the farm was not operated for profit where the farm had suffered substantial continuing losses without much chance of future profits. The appellate decision is designated as not for publication. **Borsody v. Comm'r, T.C. Memo. 1993-534, aff'd, 96-2 U.S. Tax Cas. (CCH) ¶ 50,415 (4th Cir. 1996).**

LOSSES. The taxpayer's employment was terminated and the taxpayer sued the employer for wrongful termination, seeking \$200,000 in damages for lost wages. The parties settled for \$27,000. The taxpayer claimed the difference as a loss. The court held that the mere expectation of payment was insufficient to support the deduction. **Kukes v. Comm'r, T.C. Memo. 1996-363.**

PENSION PLANS. The taxpayer suffered a downturn in business and had to make premature withdrawals from SEP and Keogh plans to pay debts. The taxpayer included the payments in gross income but did not pay the 10 percent additional tax of I.R.C. § 72(t). The taxpayer argued that, although not provided in the statute, there should be an exception to the additional tax for withdrawals necessitated by financial hardship. The Tax Court refused to recognize any exception not specifically provided in the statute and

held that the taxpayer was liable for the 10 percent additional tax. **Pulliam v. Comm'r, T.C. Memo. 1996-354.**

The taxpayer owned an interest in a qualified retirement plan through the taxpayer's employer. The taxpayer was 36 when the taxpayer withdrew \$50,000 from the plan and used the funds to purchase a family residence. The court held that the use of the funds to purchase a home was not a transfer to an eligible retirement plan and caused the funds to be included in the taxpayer's gross income, plus a 10 percent penalty for early withdrawal. **Coffield v. Comm'r, T.C. Memo. 1996-365.**

PREPRODUCTION EXPENSES. In 1985, the taxpayer purchased a corporation which owned farm land and intended to use the land for the production of ornamental trees. In 1985, the taxpayers cleared the land, bought seedlings and planted the trees. In 1986, the taxpayers' expenses were substantially preproductive expenses for the maintenance of the trees. The court acknowledged that for 1985 and 1986, the taxpayers had the election to deduct or capitalize these expenses. The taxpayers incurred similar expenses in 1987 through 1990 because the trees were still not ready for sale, although the trees should have been ready within three years of planting. The taxpayers claimed the 1985-1990 expenses as business deductions and the court held that this constituted an election by the taxpayers not to capitalize the expenses. The taxpayers sought to file amended returns for 1987-1990 to revoke the election. The court held that the taxpayers could not revoke the election without the consent of the IRS. **Hodel v. Comm'r, T.C. Memo. 1996-348.**

SALE OF RESIDENCE. The taxpayer had been married to and lived with a former spouse at one residence. The couple were divorced and as part of the divorce settlement, the former spouse was allowed to live at the marital residence with the provision that when the residence was sold, each would receive one-half of the proceeds. The taxpayer went to live with another person and eventually married that person. The former residence was sold with the taxpayer recognizing gain from the taxpayer's one-half of the proceeds. The taxpayer did not include the gain in income because of I.R.C. § 1034 deferral of gain from the sale of a residence. The taxpayer and new spouse then sold the second residence and purchased a new residence, again deferring gain under I.R.C. § 1034. The court held that the sale of the first residence was not eligible for deferral of gain because it was not the taxpayer's principal residence at the time of the sale. The court noted the inconsistency of the taxpayer's deferrals in that the second residence could not be the taxpayer's principal residence at the same time as the first residence was the taxpayer's principal residence. **Perry v. Comm'r, 96-2 U.S. Tax Cas. (CCH) ¶ 50,405 (9th Cir. 1996).**

TAX LIENS. A corporation owed federal taxes and owed the taxpayer amounts from a judgment rendered against the corporation. The IRS filed a Notice of Levy on September 1, 1994 and filed a Notice of Federal Tax Lien (NFTL) against amounts owed to the corporation by a third party. The taxpayer had obtained a state court writ of garnishment against the third party on October 14, 1994. The issue was whether the federal tax lien was effective as of the Notice of Levy or when the NFTL was filed. The

court acknowledged some split in authority on the issue but followed the more recent precedents and held that the lien became effective only after the NFTL was filed. **Sandclay Trucking, Inc., 96-2 U.S. Tax Cas. (CCH) ¶ 50,394 (M.D. Fla. 1996).**

LANDLORD AND TENANT

EMBLEMENTS. The plaintiff purchased farm land from an estate. The decedent had leased the land to the defendant who grew Christmas trees on the property. The lease allowed termination by the decedent or successors in interest by at least 30 days' notice prior to January 30 of each year. During the sale negotiations, the plaintiffs expressed concern about the lease and the defendant was approached for a release of the lease. The defendant signed a quitclaim deed releasing all rights in the real property. The sale was completed but the defendant continued to care for the trees on the property and removed 190 of them several months after the sale. The plaintiffs sued for timber trespass. The defendant argued that the doctrine of emblements allowed the removal of the trees because the lease was for an uncertain period and the trees were planted by the defendant before the termination of the lease. The defendant also claimed that the quitclaim deed was not voluntarily entered into because the defendant had defaulted on rent payments and was under the threat of termination of the lease. The court held that the defendant voluntarily executed the quitclaim deed because the default resulted from the defendant's own actions. The court also held that the quitclaim deed also released the defendant's emblements rights because the defendant's rights in the trees passed under the deed as part of the realty. **Taggart v. Battablia, 915 P.2d 1001 (Or. Ct. App. 1996).**

TERMINATION NOTICE. In March 1994, the plaintiffs purchased farmland which was leased to the defendants by the sellers. (See case summary of issue of validity of the lease under **Trusts**, *infra*.) In May of 1994, the plaintiffs sent a notice of the termination of the lease, effective June 1, 1994, and demanded possession of the land by that date. The lease was found to be a year-to-year lease because the plaintiffs did accept some rent payments and was found to run with the calendar year. The defendants continued to retain possession until after the 1995 crop was planted and the defendant also sought rights to the planted crop. The defendants argued that the notice was ineffective to terminate the lease, under Mo. Stat. § 441.050, because the notice was not given 60 days before the end of the year. The court held that the statute required notice "not less than 60 days" prior to the end of the lease year; therefore, a notice of termination given seven months before the end of the year was effective to terminate the lease at the end of the year. The trial court had awarded the 1995 crop to the defendants with the right to harvest the crop and sell it, subject to payment of one-third to the plaintiffs less the costs of harvest. The appellate court remanded on this issue because the trial court failed to give any authority or findings of facts to support this ruling and because the holding summarized here reversed the trial court on the termination issue. **Jansen v. Pobst, 922 S.W.2d 43 (Mo. Ct. App. 1996).**

NEGLIGENCE

SAFE WORKPLACE. The plaintiff was an employee of the defendant which operated a dairy farm. The plaintiff was injured while attempting to remove frozen feed from a conveyer in the milking barn. The plaintiff testified as to the dangers of working in the barn in cold weather when the high humidity in the barn and the cold winter air would often produce slippery conditions in all parts of the barn. However, the plaintiff had prepared testimony from experts that the method chosen by the plaintiff to clear the conveyer was the only reasonable method available. The plaintiff charged that the lack of alternative methods created an unsafe workplace. The defendant argued that the plaintiff realized and assumed the risk of using the method to clean the conveyer. The trial court had granted the defendant a summary judgment, but the appellate court reversed, holding that the plaintiff's intended expert testimony was sufficient to raise a jury question as to whether the plaintiff had a choice in method of cleaning the conveyer. **Mack v. Kranz Farms, Inc., 548 N.W.2d 812 (S.D. 1996).**

PRODUCTS LIABILITY

TRACTOR. The plaintiff's decedent was killed when the decedent's tractor turned over while the decedent was operating it in a farm field. The plaintiff sued the manufacturer of the tractor in strict liability, claiming that the tractor was unreasonably dangerous because it did not have a Roll Over Protection System (ROPS) installed. The defendant argued that the tractor was not dangerous because the lack of a ROPS was an obvious condition of the tractor. The court held that the open and obvious defense did not apply in Missouri because of the availability of the comparative fault rule. Because the jury award included a finding that the plaintiff's decedent was 10 percent at fault, the jury award accounted for the decedent's assumption of risk in operating the tractor without a ROPS. **Miller v. Varsity Corp., 922 S.W.2d 821 (Mo. Ct. App. 1996).**

STATE REGULATION OF AGRICULTURE

AERIAL CROP SPRAYING. The appellant was fined \$1,500 under Tex. Agric. Code § 76.116(a)(1) for the aerial spraying of a pesticide on an automobile on a public highway near cotton fields the appellant was spraying. The appellant argued that the evidence was insufficient to prove that the appellant sprayed the field on the day claimed. The evidence presented was the testimony of the occupants of the car and state inspectors who inspected the car and the field the day after the alleged spraying. The appellant's major argument was that the description of the plane by the car occupants was incorrect. However, the occupants' description of the plane's colors was close, although not completely accurate, and the inspectors' tests on the pesticide residue were consistent with the break down of the pesticide over one day. The court held that the fine was supported by substantial evidence. **Lauderdale v. Texas Dept. Of Agric., 923 S.W.2d 834 (Tex. Ct. App. 1996).**

APPLES. The plaintiffs were apple growers who had contracted with the defendant commission merchant to

process, package, market and sell the plaintiffs' apples on consignment. The contracts authorized the defendant to sell the apples to affiliated companies and to commingle the apples with other growers' apples. The defendant sold some of the apples, commingled with other apples, to affiliated companies and the plaintiffs charged that these sales violated Wash. Rev. Code § 20.01.330(4) in that the defendant failed to give notice of the sales to affiliates. The defendant argued that the statute was not violated because the contracts allowed the sales of apples to affiliates. The court held that the contractual authority to make the sales was not equivalent to notice to the growers and held that the sales violated the statute. The defendant also argued that, because the apples were commingled as allowed by the contract, notice was not possible since the identity of the producer was lost. The court held that the statute provided no exception from the notice requirement for difficulty in making the notice. The jury had awarded the plaintiffs \$38,000 in damages, representing the *gross* profits of the defendant from the affiliate sales. The court found that the defendant had not breached any fiduciary duties in the sales because the sales were authorized by the contracts, the defendant fully reported the sales to the plaintiffs and exercised prudent business judgment in making the sales. Therefore, the court held that the plaintiffs' recovery would be limited to the *net* profits gained by the affiliates from the sales. **St. Hilare v. Food Services of America, 917 P.2d 1114 (Wash. Ct. App. 1996).**

TRUSTS

APPARENT AUTHORITY. The decedent had owned farm land with a predeceased spouse for several years and continued to own the land alone for several years but rented the land to the defendants. The decedent transferred the farm to a trust for the decedent's children with the decedent retaining a life estate in the trust income. Although the lease payments were to be made to the trustees, the children, the decedent continued to personally collect the rent. The testimony of the trustees was that both trustees informed the defendants that the decedent no longer had the authority to sign contracts concerning the land. However, the defendants entered into two more long term leases with the decedent. After the decedent died, the land was sold to the plaintiff who informed the defendants that the lease was terminated and that the defendants should vacate the property in 60 days. (See summary of the issue of the termination of the lease under **Landlord and Tenant, supra.**) The plaintiffs argued that the lease was invalid in that the decedent had no authority to make the lease. The defendants argued that the trustees had ratified the lease by not objecting to it or by the practice of payment of the rent to the decedent. The court upheld the jury verdict that the lease was invalid, holding that there was sufficient evidence that the decedent did not have apparent authority to make the lease or that the defendants reasonably relied on the decedent's conduct, since the defendants had notice of the trust. **Jansen v. Pobst, 922 S.W.2d 43 (Mo. Ct. App. 1996).**

ZONING

EXCEPTIONS. The petitioner owned farm land neighboring the respondents. The respondent had petitioned the county land use board (LUBA) for construction of a second residence on the respondent's land. The respondent's land had been zoned agricultural but had been rezoned for residential use which allowed the construction of only one residence on the property. Under Policy 8 of the county's comprehensive zoning plan, protection of agricultural activities was to be of primary importance in zoning matters. The hearing officer and, on appeal, LUBA determined that Policy 8 did not apply because the respondent's land was not used or zoned for agricultural activities. The court held that the hearing officer should have applied Policy 8 because the zoning change would impact neighboring farm land. **Gutoski v. Lane County, 917 P.2d 1048 (Or. Ct. App. 1996).**

CITATION UPDATES

Estate of Shelfer v. Comm'r, 86 F.3d 1045 (11th Cir. 1996) (marital deduction) see p. 113 *supra*.

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